SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 13 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. 471

GEORGE W. LYNCH,

Petitioner,

v.

STATE OF INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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OCTOBER TERM, 1968

No.

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v.

STATE OF INDIANA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

The Petitioner, George W. Lynch, prays that a Writ of Certiorari issue to review the judgment of the Indiana Supreme Court in the above case.

OPINION BELOW

The opinion below is reported at 245 N.E.2d 334 and is printed in the appendix to this petition.

JURISDICTION

The judgment of the court below was entered on March 19, 1969. A timely petition for rehearing was filed and rehearing was denied on April 30, 1969. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1257(3).

QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States creates a right to appeal from judgments in state proceedings which result in a substantial loss of liberty or property.

CONSTITUTIONAL PROVISION RELIED UPON

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
>
> *Amendment Fourteen, second sentence, Constitution of the United States.*

STATUTES AND USAGES BEING QUESTIONED

Indiana Acts 1905, Ch. 169, sec. 282, p. 584 (as interpreted in recent judicial decisions)

> The Court shall grant a new trial to the defendant for the following causes or any of them:
>
> First. Irregularity in the proceedings of the court, or jury, or for any order of the court or abuse of discretion by which the defendant was prevented from having a fair trial.
>
> Second. When the jury has separated without leave of court after returning to deliberate upon the verdict.

Third. When the jury has received and considered any evidence, paper or document not authorized by the Court.

Fourth. When the jury has been guilty of any misconduct tending to prevent a fair and due consideration of the case.

Fifth. When the verdict has been found by means other than a fair expression of opinion on the part of all the jurors.

Sixth. Accident or suprise which ordinary prudence would not have guarded against.

Seventh. Error of law occurring at the trial.

Eighth. Newly discovered evidence, material for the defendant which he could not with reasonable diligence, have discovered and produced at the trial.

Ninth. When the verdict of the jury or the finding of the court is contrary to law or is not sustained by sufficient evidence.

The motion for a new trial and the causes therefor shall be in writing and must be filed within thirty (30) days from the date of the verdict or finding; and any such cause not disclosed in the record shall be sustained by affidavit. The motion must be filed in open court, if the court be then in session, otherwise it shall be filed with the clerk of the court.

Indiana Supreme Court Rule 2-6, (Third Paragraph)

In all cases in which a motion for a new trial is the appropriate procedure preliminary to an appeal, such motion shall be filed and shall separately specify as grounds therefor each error relied upon however and whenever arising up to the time of the filing of such motion, and as assignment of error on appeal to the effect that the trial court erred in overruling said motion shall be the only means of raising said asserted errors on appeal. In all other cases and in cases of asserted errors arising subsequent to the filing of the motion for a new trial, such asserted errors may be assigned independently.

Indiana Supreme Court Rule 2-40 (First Paragraph)

> Hereafter no court shall have jurisdiction to entertain any action for a writ of error coram nobis in any criminal case, but the remedy heretofore granted in such proceeding shall hereafter be obtained solely through a motion for a new trial in the case out of which the cause therefor is alleged to have originated. Each ground shall be separately specified in the motion for a new trial, and any ground or error not so specified shall be considered waived.

STATEMENT OF THE CASE

The Petitioner was convicted of a narcotics violation in the Criminal Court of Marion County, Indiana and sentenced to a term of two to ten years which he is now serving. Pursuant to Indiana's statutory rules of criminal appellate procedure, the petitioner's trial counsel filed a motion for new trial, the subsequent overruling of which provided the basis (and the only available statutory basis) for his subsequent appeal to the Indiana Supreme Court. In affirming the petitioner's conviction the Indiana Supreme Court invoked two court rules to the effect that the trial court, in the motion for new trial, must be advised with great if not exact specificity as to any legal theory to be relied upon on appeal, otherwise it will be presumed that the defendant-appellant consciously decided to waive such theory or question. In petitioner's case the Indiana Supreme Court ruled that the petitioner had, in effect, consciously waived every question which he was attempting to present in his appeal. The petition for rehearing which was filed on the petitioner's behalf dwelt on this point in detail and the same was overruled.

REASON WHY WRIT SHOULD BE GRANTED

In *Griffin v. Illinois*, 351 U.S. 12 (1957) this Court stated that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." The *Griffin* holding, however, was that there is no federal con-

stitutional right of appeal from state trial court proceedings to a higher state court and that the petitioner, Griffin, was entitled to relief only because his pauper status was preventing him from obtaining any type of an appeal while Illinois procedure provided appeals for persons who could afford it. Not noted by this Court in its *Griffin* decision or in any other decision relating to this point was the obvious fact that the *Griffin* dictum to the effect that "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has" and the *Griffin* holding (and subsequent holdings) to the effect that "paupers" are entitled to at least the vestiges of a meaningful appeal but no person is entitled to a perfect or near-perfect defense are dramatically inconsistent.

The aforesaid dictum envisions a continuum in terms of the quality of the defense and number of remedies available to a criminal defendant, both before and after conviction while the aforesaid holding envisions a dichotomy between "paupers" and "non-paupers." While it is perfectly true that it never could be possible in the name of "equal protection," to place every accused or convict in the position of a millionaire accused or convict and to provide every accused with a perfect or near-perfect defense or appeal, it also is a true and inescapable fact that numerous injustices will result from an appellate system which permits only a wealthy accused (or only an extremely lucky accused who has an unusually conscientious attorney) to have a meaningful appeal. (It will be shown hereinafter that this is precisely the situation that obtains under the Indiana statute, rule and usages being questioned.) The "Equal Protection" clause of the Fourteenth Amendment to the United States Constitution, as that clause has been interpreted by this Court in *Griffin*, falls far short of rendering moot the "due process" clause which also appears in the said amendment. "Equal Protection" as this Court has interpreted that phrase in *Griffin*, falls far short of providing a remedy by which "the kind of trial a man gets" does not depend "on the amount of money he has." Such a remedy can be available

only if the "Due Process" clause of the Fourteenth Amendment creates a right of appeal in the state courts of the sort (of right) which this Court found to be non-existent in its *Griffin* decision.

The *Griffin* case produced the rule that where a state affords appellate review of criminal convictions and where a transcript of the proceeding is essential to an appeal, an indigent accused must have the same opportunity to obtain a transcript that is afforded a solvent accused. It must be noted that the *Griffin* decision tacitly held that an accused's appellate opportunities will affect the fairness of his trial. It is, of course, obvious that the degree of care which a trial judge will exercise in handling questions which arise at a trial will be affected by the likelihood that the accused will succeed in presenting the question to a higher court.

In *Douglas v. California*, the matter in question in the *Griffin* case was discussed somewhat further to the following effect:

> "The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal."

Douglas v. California, 372 U.S. 353 (1963)

It would be difficult to imagine a more meaningless opportunity to appeal than one which makes it necessary for an indigent, or near indigent, accused to waive everything which he does not manage to allege with all of the technical nicities in a motion for new trial.

The general question being presented herein was considered by the Indiana Supreme Court five years ago in its reconsideration of *State ex rel Macon v. Orange Circuit Court* on remand from this Court. This Court remanded the *Macon* case in the light of *Lane v. Brown*, 372 U.S. 477 (1963) which had applied the *Griffin v. Illinois* doctrine to Indiana's particular appeals system. The *Macon* case presented the question of whether the appellant could be regarded as having waived questions presented by the rulings at the trial

by reason of the fact that they had not been recited in a motion for a new trial and presented within thirty days after the verdict. The Indiana Supreme Court had this to say:

> ". . . a pauper and a rich man alike are bound in this state by the action or non-action of competent trial counsel. So far as we can find, that principle is true in federal courts if there is a failure to file a motion for a new trial within five (5) days and no request is made within such time to file a belated motion as to matters occurring during the trial.
>
> . . . we do not believe the United States Supreme Court is deliberately imposing a double standard on state and federal courts in regard to the requirements of a transcript and the appointment of counsel in every case when a belated motion for a new trial (or writ of error coram nobis) is requested in a criminal case, particularly when no motion was filed within the liberal period of thirty (30) days in Indiana, compared to five (5) days under the rules approved for federal trial courts."
>
> *State ex rel Macon v. Orange Cir. Ct.*, 245 Ind. 269 (1964)

In the same *Macon* decision the Indiana Supreme Court went on to consider the practical difficulties of preserving errors in the motion for new trial and it suggested the solution cited above in the first quote from the *Macon* case, namely, that presumably competent trial counsel would file a proper motion for new trial and the absence of such a filing would give rise to the presumption that presumably competent counsel presumably found no grounds for appeal (and, perhaps, that presumably competent counsel was presumably competent because he didn't file a motion for new trial alleging his own incompetence).

All of the federal circuits (Rule 4b, Federal Rules of Appellate Procedure) and the appeals courts of the two largest states (Rule 31, California Rules of Court & Cons. Law of N.Y. Ann., Book 66, Pt. 2, Sec. 522 and 523) do without any burdensome requirements and permit the initiation of

an appeal which specified nothing in the way of errors to be relied upon.

West Digest Keynote Criminal 1064 which is headed "Statement of grounds for New Trial or in Arrest" provides a picture of the practice in other states as compared to Indiana. West's Seventh Decennial Digest lists a total of 651 separate case citations for the 1956-65 decade under that heading, indicating the disposition of an appellate issue on the basis of its inadequate recitation in a motion for new trial or similar document. A majority, or 343 of these cases were cases from the State of Missouri. The pertinent statutory law of Missouri provides a ready explanation for this as it was the practice in Missouri during the 1956-65 decade to consider issues on appeal on the basis of a bare motion for new trial unassisted by any brief. This practice has been changed recently to greatly decrease the need for specificity in the specifications of error while requiring briefing on all questions raised except sufficiency of the evidence and sufficiency of the charge: Supreme Court Rule 28 (Criminal Procedure) Missouri. The Missouri system, although it has resulted in a very large number of Criminal Keynote 1064 rulings, clearly operates to give the accused every opportunity for a hearing on the merits in his appeal. The remaining Criminal Keynote 1064 rulings in the 1956-65 decade were apportioned among the other states as follows:

Georgia	26.29%
Illinois	14.61%
Indiana	12.01%
Kansas	7.79%
Kentucky	7.79%
Oklahoma	6.81%
Twenty-three Other States	24.67%

Georgia will lose its No. 1 standing when the Eighth Decennial Digest is compiled because Georgia has very recently abandoned the motion for new trial as a pre-requisite for appeal:

> 6-702 (a) A motion for new trial need not be filed as the condition precedent to appeal or considera-

> tion of any judgment, ruling or order in any case, but in all cases where motion for new trial is an available remedy the party entitled thereto may elect to file the motion first or appeal directly.
>
> *Ga. Ann. Stat. 6-702* (Acts 1965), pp. 18, 20 1966, pp. 493, 494

Illinois likewise has undertaken a procedure which will drastically reduce the number of its Criminal Keynote 1064 rulings:

> The Illinois Supreme Court Rules and the Code of Criminal Procedure provide that the only method of review in criminal cases is by appeal. There is a thirty-day time limit for the filing of appeals, but the court has discretion to hear an appeal within fourteen months in meritorious instances. Further, no time limit for taking appeals is a condition precedent to the court's obtaining jurisdiction. Pursuant to the policy of affording substantial justice to the defendant, the court may pass on important defects in proceedings which affect prisoners' rights even when those defects are not raised by the appellant or have not been called to the attention of the trial judge. Ill. Rev. Stat. ch. 38, Secs. 121-9 (1963)
>
> *Federal Habeas Corpus, Its Uncertain Effects On Illinois Law*, (Anon. Note) 59 Northwestern Law Review, 696, 700, 701 (1964)

Kansas, which ranks just below Indiana in the above list, will have dropped substantially down on the list by the time the Eighth Decennial Digest is compiled because of the the following recent enactment:

> (d) Statement of points. Each appellant shall serve and file with his designation of the record a concise statement of the points on which he intends to rely and which will be briefed in the appeal . . . . An issue may be raised in the statement of points regardless of whether a motion for new trial was filed.
>
> *Kansas Stat. Ann. 60-2701, Rule 6-D Eff. 1/1/64*

Kentucky likewise is dropping from the ranks of states which resolve appellate issues by the technical contrivance of requiring exacting specificity in motions for new trial:

> (1) An appeal to the Court of Appeals is taken by the filing of a notice of appeal with the circuit court.
>
> (2) Where a motion for an appeal before the Court of Appeals is required the record on appeal shall be made up in the same time and manner as in the case of appeals permitted as a matter of right. The motion for appeal shall be made at the time the record on appeal is filed with the Court of Appeals. A motion for appeal shall not dispense with the requirement of filing in the circuit court a notice of appeal within the time prescribed by Rcr 1254.
>
> (3) The notice of appeal shall specify the party or parties taking the appeal, and shall designate the judgment or order appealed from.
>
> *Ky. Rcr 12.52, Effective 1/1/65*

Since the enactment of the above-quoted statute, it has been held that the overruling of a Kentucky motion for new trial is no longer appealable. *Sherley v. Commonwealth,* (1967) 413 S.W.2d 627.

The State of Oklahoma is the only state in addition to Indiana among the states which appear on the above list where the law regarding the specificity of points to be relied upon in an appeal has remained unchanged. Title 22, Okla. Stat. Ann. Sec. 1055. However, it is not a motion for new trial intended to advise the trial judge of any errors he may have committed before his decision is placed in jeopardy of reversal but a "Petition in Error" similar to Indiana's "Assignment of Errors" that requires such specificity as to enable opposing counsel to determine whether he should designate additional portions of the record for consideration on appeal.

Thus Indiana stands alone and in a position of somewhat dubious "pre-eminence" with respect to its zealous safeguarding of a trial judge's opportunity to reconsider his rulings

prior to an appeal. At a time when the courts of all the states and the federal courts are demonstrating increased concern for the rights of the accused, such consideration for the "rights" of judges is unique indeed.

The purpose of an appellate system is to maintain the quality of judicial enforcement of the law in the trial courts and an appellate procedure which gives trial judges the "right" to be advised in advance as to the claims which will be made against them on appeal with a greater degree of specificity than an accused is entitled to in the initial criminal information against him and which enforces that right at all costs to the detriment of the rights of accused persons and civil litigants constitutes an abdication of that purpose. The existence of appellate remedies if the requirements of due process should constitute a Damocles Sword hanging over the trial judge at all stages of the proceedings and not just at one point, several weeks after the trial, when what typically amounts to a pitiful attempt to preserve the issues for appeal is presented to him.

At the time the Constitution of the United States was enacted, it was unclear whether the opportunity to appeal from judgments substantially effecting property or liberty should be regarded as a fundamental right. At the time of the said enactment, Anglo Saxon law and other existing law was unclear on this point. But, at the time the Fourteenth Amendment was enacted—such ambiguities did not exist. As of the time of the said latter enactment, appellate processes were available in every existing state and appellate remedies were universally recognized as being essential to a legal system capable of affording due process of law. No trial judge in any state is elected or appointed or recognized as a final arbitror of substantial issues, but where there is an appellate practice (as there is in Indiana and in Indiana alone) of deeming issues "waived" which were preserved as of the conclusion of the trial and which are argued vigorously in an appeal based upon a technically imperfect pleading filed to initiate the appeal, trial judges become such final arbitrors for all except wealthy litigants and unusually for-

tunate litigants who are represented with a competence and a thoroughness that is highly atypical.

WHEREFORE, Petitioner prays that a writ of certiorari issue to the Supreme Court of Indiana and that its decision in this cause be reversed with instructions to consider petitioner's state appeal on the merits and to infer no waiver of issues preserved as of the conclusion of his trial, mentioned in some way in his motion for new trial and argued on his appeal.

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APPENDIX

GEORGE W. LYNCH v. STATE OF INDIANA

Supreme Court of Indiana
No. 867 S65
March 19, 1969

Appeal From The Marion Criminal Court
Hon. John T. Davis, Judge.

GIVAN, J.

This is an appeal from a conviction under an affidavit charging the appellant with the possession and control of marihuana in violation of the Indiana 1935 Narcotic Act, as amended. On his plea of not guilty the appellant was tried by the court without a jury and found guilty as charged. Appellant was sentenced to a term of not less than two nor more than ten (10) years.

The content of appellant's motion for new trial was as follows:

> "Comes now the defendant, by counsel, and moves the court herein for a new trial for the following reasons:
>
> 1. The finding of the court is not sustained by sufficient evidence.
>
> 2. The finding of the court is contrary to law.
>
> 3. The court erred in admitting into evidence State's Exhibit No. 1.
>
> WHEREFORE, defendant prays that he be granted a new trial herein."

This motion for new trial was filed in court on the 14th day of April, 1967. Rule 1-14B of this court, which was adopted on the 13th day of January, 1967, and became effective on the 1st day of March, 1967, requires that whenever a motion for new trial is requested on the ground that the verdict or decision is not sustained by sufficient evidence

or is contrary to law the moving party shall file a memorandum stating specifically wherein such evidence is insufficient or the verdict or decision is contrary to law. No memorandum supporting the above motion for new trial was filed. Therefore, the first and second specifications in the motion for new trial were not properly presented to the trial court and will not be considered on appeal here.

In the third ground for new trial above stated, the appelland claims error in the admitting of State's Exhibit No. 1. However, under the procedural law of Indiana, the motion must contain a copy or the substance of the exhibit claimed to have been erroneously admitted, and must state the grounds of the objections to the evidence. *Golden Guernsey Farms v. State* (1945), 223 Ind. 606, 612, 63 N.E.2d 699.

The assignment of errors filed in this cause assigns only the overruling of appellant's motion for new trial. Therefore, all other matters which the appellant has attempted to raise in his brief which are not covered by the motion for new trial have been waived. *Haddock v. State* (1965), 246 Ind. 269, 671 [5 Ind. Dec. 599], 207 N.E.2d 813.

The decision of the trial court is, therefore, affirmed.

DeBruler, C.J., Arterburn, Hunter and Jackson, JJ. concur.

SUPREME COURT, U. S.

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vs.

STATE OF INDIANA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, the State of Indiana, prays that the Petition for a Writ of Certiorari to review the judgment of the Indiana Supreme Court in the above case be denied.

CONSTITUTIONAL PROVISIONS AND COURT RULES INVOLVED

Amendment 14 to the Constitution of the United States, provides:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Indiana Supreme Court Rule 1-14B provides:

"Whenever a new trial is requested on the ground or grounds 'that the verdict or decision is not sustained by sufficient evidence or is contrary to law,' the moving party shall file a memorandum stating specifically under such itemized cause wherein such evidence is insufficient or the verdict or decision is contrary to law. *The party filing such motion shall be deemed to have waived any ground not specified in the memorandum.*" (Emphasis added)

United States Supreme Court Rule 23.1(f):

"The petition for writ of certiorari shall contain in the order here indicated

* * *

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific positions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Indiana Supreme Court Rule PC 2, § 2 provides:

> "Any defendant convicted after a trial may petition the Supreme Court for permission to file a Belated Appeal where:
>
> (a) He filed a Motion for New Trial which was overruled;
>
> (b) No appeal was perfected for the defendant;
>
> (c) The failure to perfect the appeal was not due to the fault of the defendant; and,
>
> (d) The defendant has been diligent in requesting permission to file a belated appeal." Advance sheets August 13, 1969, 248 N.E. 2d—No. 5, 249 N.E. 2d—No. 1, p. XLIV.

QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner may raise, in this court, for the first time, on a petition for a writ of certiorari to review the decision of the Supreme Court of Indiana, federal constitutional questions which were not raised and decided in the Indiana Supreme Court.

2. Whether the decision of the Indiana Supreme Court in this cause was based on independent and adequate state grounds.

3. Whether petitioner was denied equal protection of the law under the fourteenth amendment of the United States Constitution.

4. Whether petitioner was denied due process of law under the fourteenth amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted for the possession of marihuana. Petitioner filed a motion for a new trial with the trial court challenging the sufficiency of the evidence to support his conviction. However, Petitioner did not file a Memorandum with his Motion for New Trial as required by Rule 1-14B, Rules of the Supreme Court of Indiana. The Indiana Supreme Court affirmed the judgment of the trial court convicting Petitioner for Petitioner's failure to file the required Memorandum. Petitioner now claims he was denied the equal protection of the laws and the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by the decision of the Indiana Supreme Court.

ARGUMENTS AGAINST GRANTING THE WRIT

I

Petitioner May Not Raise, in This Court, for the First Time, on a Petition for a Writ of Certiorari to Review the Decision of the Supreme Court of Indiana, Federal Constitutional Questions Which were Not Raised and Decided in the Indiana Supreme Court

Petitioner claims that the Indiana Supreme Court's dismissal of his appeal for his failure to comply with Rule 1-14B, Rules of the Indiana Supreme Court, was a denial of the equal protection of the law and the due process of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Rule 23.1(f), 28 U.S.C.A., Supreme Court Rules, provides that:

"The petition for writ of certiorari shall contain in the order here indicated

* * *

"(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court, with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

Even a casual examination of petitioner's Petition in this Court indicates petitioner has wholly failed to comply with Rule 23.1(f). Arguably, petitioner's failure to comply with this requirement of the rule is jurisdictional and hence his Petition must be denied out of hand by this court. See *Cardinalle v. Louisiana,* 89 S.Ct. 1162 (1969).

However, it is readily apparent that a more fundamental reason lies for denying this petition. Petitioner could not comply with Rule 23.1(f) because the federal questions sought to be reviewed here were never presented to or decided by the Indiana Supreme Court. An examination of the Indiana Supreme Court's decision in *Lynch v. State,* — Ind. —, 245 N.E. 2d 334 (1969), dismissing petitioner's appeal readily discloses that the federal questions peti-

tioner seeks to have reviewed here were never raised in, or decided by, the Indiana Supreme Court. "It was very early established that the court will not decide constitutional issues raised here for the first time on review of state court decisions." *Cardinalle v. Louisiana*, 89 S.Ct. 1162 (1969). Thus, this petition should be denied.

II

The Decision of the Indiana Supreme Court in This Cause Was Based on Independent and Adequate State Grounds

This Court has long declined to review state court judgments resting on independent and adequate state grounds, because to do so would be to render advisory opinions. See *Fay v. Noia*, 372 U.S. 391, 428 (1963) where the Court said:

> "It is a familiar principle that this court will decline to review state court judgments which rest on independent and adequate state grounds, notwithstanding the copresence of federal grounds."

The principle of not reviewing State court judgments, resting on independent state grounds, applies to both procedural and substantive State grounds. *Henry v. Mississippi*, 379 U.S. 433 (1965). Regarding State procedural grounds, in *Henry, supra*, the Court stated:

> "These cases settle the proposition that a litigant's procedural default in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with his procedural rules serves a legitimate state interest." at p. 477.

See also, *Cardinalle v. Louisiana, supra.*

Petitioner was convicted for the possession of marijuana in a state trial court having criminal jurisdiction. Petitioner filed a motion for a new trial challenging the sufficiency of the evidence to support his conviction. Petitioner did not, however, file a memorandum with his motion for new trial in the trial court specifying the particulars in which the evidence was insufficient.

Rule 1-14B, Rules of the Indiana Supreme Court, provides that:

> "Whenever a new trial is requested on the ground or grounds 'that the verdict or decision is not sustained by sufficient evidence or is contrary to law,' the moving party shall file a memorandum stating specifically under such itemized cause wherein such evidence is insufficient or the verdict or decision is contrary to law. The party filing such motion shall be deemed to have waived any ground not specified in the memorandum."

The Indiana Supreme Court affirmed the decision of the trial court for petitioner's failure to file a memorandum with his motion for a new trial as required by Rule 1-14B, Rules of the Indiana Supreme Court. Petitioner alleged three grounds for a new trial. The Supreme Court said:

> ". . . [T]herefore, the first and second specifications in the motion for new trial were not properly presented to the trial court and will not be considered on appeal here.
>
> "In the third ground for new trial above stated, the appellant claims error in the admitting of State's Exhibit No. 1. However, under the proce-

dural law of Indiana, the motion must contain a copy or the substance of the exhibit claimed to have been erroneously admitted and must state the grounds of the objections to the evidence. *Golden Guernsey Farms v. State* (1945), 223 Ind. 606, 612, 62 N.E. 2d 699.

"The assignment of errors filed in this cause assigns only the overrulings of appellant's motion for new trial. Therefore, all other matters which the appellant has attempted to raise in his brief which are not covered by the motion for new trial have been waived. *Haddock v. State* (1965), 246 Ind. 269, 671 [5 Ind. Dec. 599], 207 N.E. 2d 813." *Lynch v. State*, — Ind. —, 245 N.E. 2d 334, 335.

In a more recent case involving an identical question, the Indiana Supreme Court explained its reasons for affirming a lower court conviction for an appellants failure to comply with Rule 1-14B, Rules of the Indiana Supreme Court. The court said:

". . . [I]t [Rule 1-14B] requires that a party present an alleged reversible error to the trial court with some degree of specificity prior to presenting it to this court on appeal. The rule was intended to allow a trial court some opportunity to review and correct its own errors and, thereby, in some instances avoid the extra travail and expense of an appeal." *Graham v. State*, — Ind. —, 249 N.E. 2d 25 (1969).

An additional reason appears for the Indiana Rule. A reversal of a trial judge has an adverse effect upon his career as a judge. See Graham v. State, *supra*. To fully understand the reasons assigned by the court for the Indiana Rule it must be pointed out that a judge in Indiana is elected to the bench. Moreover, a trial judge's reputation depends in part upon reversals of his decisions by the

Indiana Supreme Court. The reputation of a judge whose judgments are reversed suffers thereby diminishing his opportunity to return to the bench by way of reelection.

Whatever the merits of the Indiana Rule, the bench and bar in Indiana must work within the existing framework. The existing framework involves judges who are elected to the bench and Indiana Supreme Court Rule 1-14B. The rules are clear and all parties are apprised of them. The Indiana Rule is an independent and adequate state ground clearly serving a legitimate state interest. Consequently this court should decline direct review of the matter by certiorari.

III

Petitioner Was Not Denied the Equal Protection of the Laws as Guaranteed by the Fourteenth Amendment of the Constitution of the United States

Petitioner alludes to the Fourteenth Amendment to the Constitution of the United States providing that no state shall deny any person ". . . the equal protection of the laws." Petitioner apparently claims, somewhat obscurely, that Rule 1-14B, Rules of the Indiana Supreme Court, applies to indigents, a class to which Petitioner claims to belong, but not to one financially able to employ his own attorney. There is absolutely no basis in fact or law to support Petitioner's claim. Rule 1-14B applies to rich and poor alike.

The cases relied upon by Petitioner afford absolutely no support for his contentions. *Griffin v. Illinois*, 351 U.S. 12 (1957), involved an accused denied a free transcript neces-

sary for an appeal. Petitioner had a transcript. *Douglas v. California,* 372 U.S. 353 (1963), involved an accused denied free counsel on appeal. Petitioner has always had counsel. *Macon v. Orange Circuit Court,* 245 Ind. 269, 195 N.E. 2d 352, rehearing denied, 198 N.E. 2d 229 (1964), also involved an accused denied counsel on appeal. Again, Petitioner has always had counsel.

Petitioner has wholly failed to construct an argument which on the facts or the law raises an equal protection question. Thus, this Petition should be denied.

IV

Petitioner Was Not Denied the Due Process of Law as Guaranteed by the Fourteenth Amendment to the Constitution of the United States

Petitioner claims, somewhat obscurely, that in some undesignated way he was denied the due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. Respondent can only speculate that Petitioner is contending either that Rule 1-14B, Rules of the Indiana Supreme Court, requiring a Memorandum, is a denial of the due process of law, or that Rule 1-14B should not apply to Petitioner because he is a pauper. Petitioner's absurd argument merits little comment.

Rule 1-14B as interpreted by the Indiana Supreme Court provides only that an improperly preserved issue presents no question for review by the Indiana Supreme Court. The Rule provides that a Motion for a New Trial challenging the sufficiency of the evidence to support a conviction must be accompanied by a Memorandum stating with partic-

ularity why the evidence was insufficient to support the conviction. The Rule also provides that ". . . [T]he party filing such motion shall be deemed to have waived any ground not specified in the memorandum." The Indiana Supreme Court has construed the rule to mean that no issue is presented to the court on appeal and that the judgment of the lower court will be affirmed if a Motion for a New Trial is not accompanied by a Memorandum as required by Rule 1-14B. *Graham v. State,* — Ind. —, 249 N.E. 2d 25 (1969); *Lynch v. State,* — Ind. —, 245 N.E. 2d 334.

Petitioner filed a Motion for a New Trial with the trial court challenging the sufficiency of the evidence to support his conviction for the possession of marihuana. Petitioner's Motion for a New Trial was not accompanied by a Memorandum. On appeal the Indiana Supreme Court affirmed the judgment of the trial court convicting Petitioner for the reason that the errors sought to be reviewed by Petitioner were not properly preserved and hence had been waived. *Lynch v. State, supra.*

Waiver on appeal is neither new nor unique to the law of the State of Indiana. Federal Appellate Court decisions providing that improperly preserved issues are waived on appeal are legion, both in this Court and in the Federal Circuit Courts of Appeal. See *Cardinalle v. Louisiana,* 89 S.Ct. 1162 (1969).

Thus, that Indiana may provide that improperly preserved issues are waived on appeal is hardly a denial of the due process of law. Consequently the Petition should be denied.

Parenthetically, Petitioner has a viable state remedy. Rule PC 2, § 2, Rules of the Indiana Supreme Court, effective August 1, 1969, provides that a defendant failing to perfect a direct appeal through no fault of his own, as did Petitioner, may initiate proceedings to prosecute a belated appeal. Advance sheets, August 13, 1969, 248 N.E. 2d—No. 5, 249 N.E. 2d—No. 1, p. LIV. Consequently, Petitioner may still obtain a review of his conviction on the merits by means of a belated appeal.

CONCLUSION

Respondent submits that this Petition for Writ of Certiorari to the Supreme Court of Indiana should be denied.

Respectfully submitted,

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